

The Families First Coronavirus Response Act: What California Employers and Employees Need to Know

On Wednesday, March 18, President Trump signed an emergency bill ([the Families First Coronavirus Response Act](#)) which, among other things, provided a narrow expansion to the Family and Medical Leave Act (“FMLA”) and guaranteed paid sick leave for eligible employees. The Act’s effective dates are April 2, 2020 through December 31, 2020, although some employers are honoring the Act effective immediately.

Read on below for more specific information pertaining to the qualifications and exceptions contained in these two critical divisions under the Act, namely, Division C: The Emergency Family and Medical Leave Expansion Act (“EFMLA”) and Division E: The Emergency Paid Sick Leave Act (“EPSLA”).

Division C: The Emergency Family and Medical Leave Expansion Act

Which employers are required to provide EFMLA leave?

Certain public employers and all private employers with fewer than 500 employees are “covered employers” for purposes of the EFMLA and are required to provide EFMLA leave.

NOTE that this is an important difference between the existing definition of “covered employer” under the FMLA, which states that employers with 50 or more employees are subject to the FMLA. In light of this, the Act provides the Department of Labor (“DOL”) the authority to exempt business with fewer than 50 employees from these requirements; however, DOL has yet to exercise this authority as of the date of this post. DOL has noted that they expect to issue regulations in April 2020.¹

Which employees are eligible to take EFMLA leave?

Employees who have been employed for at least 30 calendar days by a covered employer are eligible for EFMLA leave.

NOTE that this is another important difference between the existing definition of “eligible employee” under the FMLA, which states that employees must have been employed by a covered employer for at least 12 months and have worked at least 1,250 hours during the last 12 months.

ALSO NOTE that the EFMLA additionally states that an employer of an employee who is a “health care provider” or an “emergency responder” can exclude such an employee from the EFMLA. While the EFMLA does adopt the definition of “health care provider” from the FMLA, there is no corresponding definition for “emergency responder” in the FMLA. The EFMLA additionally gives DOL the authority to exclude such employees from the EFMLA; DOL has yet to exercise this authority as of the date of this post.

For what reason(s) may an eligible employee take EFMLA leave?

The **only** reason that an employee may take EFMLA leave is if the employee is unable to work or telework due to a need for leave to care for a son or daughter under 18 whose school or place of care has been closed due to COVID-19, as declared by federal, state, or local authority.

NOTE that the EFMLA has adopted the definition of “son or daughter” from the FMLA.

¹ See <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>, footnote 1.

What leave can an eligible employee take under the EFMLA?

Eligible employees are able to take up to 12 weeks of job-protected EFMLA leave. The first 10 days of leave is unpaid, however, an employee may choose to substitute the 80 hours of paid sick leave pursuant to the EPSLA, described in detail below, or any other accrued vacation leave, personal leave, or medical or sick leave during those first two weeks.

For any additional weeks (up to and including the remaining available 10 weeks) of an employee's EFMLA leave, the employer must pay the employee at least two-thirds of the employee's "regular rate of pay" for the number of hours the employee would otherwise be normally scheduled to work during the leave time. For employees that have variable schedules, an employer would use the average number of hours that the employee was scheduled per day over the prior six months of employment to calculate the rate of pay.

Regardless of the type of calculation, the EFMLA places a cap on the leave paid under this division at \$200 per day and \$10,000 total.

Are employees entitled to 12 weeks of EFMLA leave in addition to other 12-week leave entitlement under the FMLA?

No. The EFMLA simply adds a new reason that an employee would be entitled to leave; it is not an additional allocation of leave time under the FMLA.

So, if an employee has already used a portion of their 12-week entitlement of FMLA leave for another qualifying reason, then the employee can only use the remaining balance for EFMLA leave. Furthermore, if the employee has previously exhausted the entirety of the 12 weeks of FMLA leave for another qualifying reason, they are not eligible to take any EFMLA leave. Similarly, if an employee exhausts their 12 weeks of EFMLA leave, the employee will be unable to take FMLA leave for another qualifying reason until they become eligible again for FMLA leave.

However, employees that have exhausted most or all of their FMLA leave may still qualify for the EPSLA leave, discussed in more detail below.

What rights to reinstatement does an employee have after taking EFMLA leave?

Employees that work for an employer with 25 or more employees have the same rights to reinstatement as they would under the FMLA. Employees that work for employers with fewer than 25 employees **do not have rights to reinstatement** if all the following conditions are met:

- The employee takes EFMLA leave;
- The position held by the employee when the leave begins does not exist due to economic conditions or other changes in operating conditions of the employer that affect employment and are caused by COVID-19 during a period of leave;
- The employer makes reasonable efforts to reinstate the employee to a position equivalent to the position the employee held when the leave began, with equivalent employment benefits, pay, and other terms and conditions of employment; and
- If such reasonable efforts of the employer fail, the employer makes reasonable efforts during the "contact period" to contact the employee if an equivalent position becomes available.

The "Contact Period" is defined as the 1-year period beginning on the earlier of: (1) the date on which the qualifying need related to the public health emergency concludes; or (2) the date that is 12 weeks after the date on which the employee's EFMLA leave commences.

Division E: The Emergency Paid Sick Leave Act

Which employers are required to provide EPSLA leave?

All private sector employers with fewer than 500 employees and public employers with one or more employees are “covered employers” for purposes of the EPSLA.

NOTE that DOL also retains authority under the EPSLA to exempt employers with fewer than 50 employees from the requirements of the EPSLA; however, DOL has not exercised this authority as of the date of this post.

Which employees are eligible to take EPSLA leave?

Any employee working for a covered employer is eligible to take EPSLA leave; there is no required employment duration as under the EFMLA.

However, as under the EFMLA, an employer of an employee who is a “health care provider” or an “emergency responder” may exclude such employees from the application of the EPSLA. Also as under the EFMLA, the EPSLA adopts the definition of “health care provider” from the FMLA, but there is similarly no corresponding definition for “emergency responder”.

For what reasons may an eligible employee take EPSLA leave?

An eligible employee may take EPSLA leave to the extent that the employee is unable to work or telework because of one of the following reasons:

- (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; or
- (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; or
- (4) The employee is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- (5) The employee is caring for a son or daughter of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable due to COVID-19 precautions; or
- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

What leave can an eligible employee take under the EPSLA?

A full-time eligible employee is entitled to up to 80 hours of paid sick leave under the EPSLA. A part-time eligible employee is entitled to the number of hours of paid sick leave equal to the number of hours that such employee works, on average, over a 2-week period.

The pay amount is calculated based on the reason that the employee is seeking leave. For reasons (1) through (3) listed above, employees shall be paid at their regular rate of pay, up to \$511 per day and \$5,110 in total for the two-week period. For reasons (4) through (6), employees shall be paid at 2/3 their regular rate of pay (or the applicable minimum wage, whichever is higher), up to \$200 per day and \$2,000 in total for the two-week period.

Does EPSLA leave run concurrently with EFMLA leave?

Yes. If the employee has FMLA leave available (regardless of whether it is regular FMLA or EFMLA), EPSLA leave would run concurrently with it. This means that employees are able to use EPSLA leave for the first 10 unpaid days of EFMLA.

How does EPSLA leave interact with existing paid leave policies?

Although under an earlier version of the EPSLA the answer to this question was clear, the final version of the bill is silent on this issue. It is unclear if EPSLA leave is *in addition* to any paid leave provided by the employer and it is unclear whether an employer can change their paid leave policies following the enactment of the EPSLA. This is an evolving issue.

What protections does an employee have after taking EPSLA leave?

The EPSLA makes it illegal for an employer to discharge, discipline, or in any other manner discriminate against any employee who: (1) takes EPSLA leave; and (2) has filed a complaint or instituted or caused to be instituted any proceeding under the EPSLA or has testified or will testify in any such proceeding.

In addition to the above divisions, the Act includes a division that qualifies covered employers to receive dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the Act. For more details on this, see Division G of the Act.

These are rapidly evolving issues; please check back for updates to this post and/or for additional or subsequent posts on these issues. If you have any questions or comments, or are in need of representation, please contact Goyette & Associates at frontdesk@goyette-assoc.com or at (916) 851-1900.